No. 12-1410

In the Supreme Court of the United States

TERRY TONASKET, dba STOGIE SHOP,
and DANIEL T. MILLER, an individual,
Petitioners,

v.

TOM SARGENT, TOBACCO TAX ADMINISTRATOR; THE COLVILLE BUSINESS COUNCIL; MICHAEL O. FINLEY, CHAIRMAN; HARVEY MOSES JR.; SYLVIA PEASLEY; BRIAN NISSEN; SUSIE ALLEN; CHERIE MOOMAW; JOHN STENSGAR; ANDREW JOSEPH; VIRGIL SEYMOUR SR.; MIKE MARCHARD; ERNIE WILLIAMS; DOUG SEYMOUR; SHIRLEY CHARLEY; RICKY GABRIEL; and THE COLVILLE CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION, a Federally Recognized Indian Tribe,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT E. KOVACEVICH
Counsel of Record
818 West Riverside, Ste. 525
Spokane, Washington 99201
(509) 747-2104
kovacevichrobert@qwestoffice.net

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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QUESTIONS PRESENTED

The core issue in this case is tribal sovereignty. Specifically, whether the Colville Confederated Tribe of Indians of the Colville Reservation is immune from suit alleging federal anti-trust violations. The Tribe sells at retail in the same market area as Terry Tonasket, its own tribal retailer. The Colville Tribe sets minimum prices on tribal member Terry Tonasket's sales by making him buy from wholesalers who charge $5.00 more per carton than other wholesalers. They also make him collect a Tribal Cigarette Tax from his customers that the Tribe keeps on Tonasket's sales and also on its own retail sales. The result is price fixing by a competitor. Both stores are located on the reservation. Their sales are almost completely to non Indian customers.

The questions presented in this case are:

1. Whether Indian tribal immunity from suit allows the Indian tribe, a price fixing competitor, to be immune from federal anti-trust laws?

2. Whether the officials of an Indian tribe that include the tribe's tobacco tax administrator, acting in violation of federal law, can be protected by tribal immunity when prospective relief is sought?

LIST OF PARTIES

All parties appear in the caption of the case on this cover page.

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The Ninth Circuit opinion dated March 5, 2013 was unpublished. It was informally reported at 2013 WL 792768 (9th Cir. 2013) App. 1 to 3. The District Court opinion was published at 830 F.Supp.2d 1079 (E.D. Wash. 2011) App. 4 to 12.

JURISDICTION

The date in which the opinion, App. 1 to 3, was filed is March 5, 2013. The mandate took effect on the same day.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the District Court was sought under 15 U.S.C. § 15, 28 U.S.C. § 1331 and U.S. Const. art. 3, § 2, cl.1. Jurisdiction of the Court of Appeals was under 28 U.S.C. § 1291.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED.

There are no constitutional provisions, statutes and regulations that establish tribal immunity. It is a federal common law concept. Petitioners contend that the federal anti-trust statutes 15 U.S.C. 1, 13, 15 and 26 et seq. apply to the Colville Tribe's price fixing regulation of its retail Indian competitor. The state law statutes regarding the state lawsuit settlement are Wash.Rev.Code 43.06.455(5)(b); 43.79.480(1); 70.157.005(e); 70.157.020(a); and 82.24.295. Also relevant is the Colville Tribal Tobacco Code 6-8-6, 6-8-7 and 6-8-10 (a) and (e).

STATEMENT

This Petition seeks to reverse the Ninth Circuit's opinion dismissing the case, upholding tribal and tribal officer sovereign immunity from suit. App. A. If tribal immunity is abrogated, officer immunity becomes moot as it is derived only from tribal sovereignty.

This case was affirmed by the Ninth Circuit in an unpublished opinion 2013 WL 792768 App. 1 affirming on the same lack of subject matter jurisdiction and that federal anti-trust laws do not abrogate tribal immunity as held in *Miller v. Wright,* 705 F.3d 919 (9th Cir. 2013). *Miller v. Wright, id* at 928, affirmed on the basis of res judicata of prior tribal court litigation, an issue not present here. Petitioners urge the Court to accept this petition regardless of the deposition of *Miller v. Wright,* for the reason that this case is distinctly a one issue tribal sovereignty case.

The Ninth Circuit erred in affirming Indian tribal sovereignty to alleged price discrimination by the Colville Tribe, a cigarette retailer in the same market area competing with its own tribal member, Petitioner Terry Tonasket. App. 1, 3.

The Colville Indian Reservation encompasses 1.3 million acres of land in the northeastern section of the State of Washington. It was established by Executive Order on July 2, 1872. App. 38. Terry Tonasket, a fully enrolled Colville Indian, operates a convenience store at Omak, Washington on the Colville Indian Reservation. Tonasket sold cigarettes to non Indian, non resident Petitioner Daniel Miller. App. 37. The Colville Tribe opened a store a mile away called Tribal

Trails Travel Plaza that sells "commercial cigarettes of the same kind and quality at retail to the general public". App. at 67. (Terry Tonasket Affidavit App. 66). The tribe's price undercuts Tonasket's price. App. 68. The Colville Tribe forced Tonasket to add over $30 per carton of cigarettes to his sales. App. 40. This will drive Tonasket out of business. App. 41. The Tribe adds the same amount to its retail price but is not taxed. Therefore, it inflates the price to Tonasket customer Miller who had to pay $30 more to purchase cigarettes from Tonasket. App. 46. *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 161 (1980) required that Petitioner Terry Tonasket's third generation convenience store had to collect State of Washington cigarette taxes on retail sales to non Indians and non member Indians. In this case, the State of Washington retroceded its tax since a tribal/state cigarette tax contract is in effect. App. 93. Wash. Rev. Code 82.24.295.

Both the Colville Tribe and Petitioner Terry Tonasket are retail sellers of commercially packaged cigarettes in the same market area. Complaint App. 39; Terry Tonasket Declaration App. 67-8.

The Colville Tribe agreed to tax Tonasket's customers 100% of the state cigarette tax and force him to buy from state certified wholesalers who charge more in order to pay into a state escrow created by a state lawsuit settlement with major tobacco manufacturers. *Colville Tribal Tobacco Code* 6-8-10; 6-8-7. No Indian tribe made any settlement with major tobacco wholesalers.

QUESTIONS PRESENTED

A. The Federal Anti-trust Laws apply to Indian tribes that are in the business of retail sales.

Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 480 (1976) prohibits state cigarette tax on Tonasket. *Confederated Tribes of the Yakama Indian Nation v. Gregoire,* 658 F.3d 1078, 1089 (9th Cir. 2011); and *Hemi Group v. City of New York,* 559 U.S. 1 (2010) place the incidence of cigarette tax on the retail customer. *Plains Commerce Bank v. Long Family Land and Cattle Co.,* 554 U.S. 316 (2008) holds that legislative tribal jurisdiction over non Indians must exist, especially when the incidence of tax is on the non Indian, non resident. *Atkinson Trading v. Shirley,* 532 U.S. 645, 659 (2001) presumes against tribal legislative authority over a non Indian, non resident. The Tribe never had the right to tax Miller, hence sovereignty against suit is never reached.

Terry Tonasket's non Indian consumers, including Miller, had to pay more due to the unfair competition in the market area. *Texaco v. Hasbrouck,* 496 U.S. 543, 554 (1990); *FTC v. Morton Salt Co.,* 334 U.S. 37, 46-47 (1948). The restriction on competition by price fixing interferes with the market in violation of federal law, 15 U.S.C. § 1, 2, and 13; *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 219 (1940). A civil remedy is available for horizontal price fixing. *Knevelbaard Dairies v. Kraft Foods, Inc.,* 232 F.3d 979, 986 (9th Cir. 2000).

The Complaint also alleges that the conduct violates federal anti-trust laws prohibiting price fixing of goods of like kind and quality. App. 53.

B. The Ninth Circuit Opinion failed to apply *Jefferson County Pharmaceutical Association v. Abbott Labs*, 460 U.S. 150 (1983).

Discrimination in price between purchasers of goods of like kind and quality is a *per se* violation of the anti-trust law. *Jefferson County, id* at 152-3. The Ninth Circuit in this case relied on *Miller v. Wright* in the Ninth Circuit, 705 F.3d at 927 that adopted the reasoning of Justice O'Conner's dissent in *Jefferson County*. This holding conflicts with the Ninth Circuit's own pronouncement in *Hart v. Massanari,* 266 F.3d 1155, 1171 (9th Cir. 2000), holding that the Ninth Circuit must follow this Court's case law.

C. The Ninth Circuit, in relying on *Miller v. Wright,* also ignored its own cases of *Donovan v. Coeur d'Alene Tribal Farm,* 751 F.2d 1113 (9th Cir. 1985); *U.S. v. Fiander,* 547 F.3d 1036, 1039 (9th Cir. 2008); *U.S. v. Smiskin,* 487 F.3d 1260, 1263 (9th Cir. 2007); and *Solis v. Matheson,* 563 F.3d 425 (9th Cir. 2009) holding that an Indian tribe is bound by a federal law of general applicability unless one of three exceptions applies.

One of the exceptions relied on by *Miller v. Wright* court was its own case of *Sanders v. Brown,* 504 F.3d 903 (9th Cir. 2007) and *Parker v. Brown,* 317 U.S. 341, 351 (1943). The complete error is that neither involved

the government as a retail competitor who fixed prices of its competition. In a complete error and a total non sequiter, the *Wright v. Miller* Ninth Circuit Opinion, without citation of authorities, stated, 705 F.3d at 927, "As we have explained, federal anti-trust laws are not intended to apply to Indian tribes. . . *Donovan's* third exception is consistent with the precedent underlying our conclusion that Congress did not include Indian tribes within the entities subject to antitrust law". The statement is contrary to that in the case of *United States v. Smiskin,* 487 F.3d 1260, 1263 (9th Cir. 2007) stating "Federal laws of general applicability are presumed to apply with equal force" to Indian tribes. The Ninth Circuit in *Wright v. Miller,* 705 F.3d at 926, relied on dicta in *Krystal Energy v. Navajo Nation,* 357 F.3d 1055, 1057 (9th Cir. 2004) for authority. *Krystal Energy,* according to *In re Whitaker,* 474 B.R. 687, 693 (8th Cir. BAP (Minn.) 2012) is not good law ". . .because the cases on which *Krystal* was based do not, in fact, support its holding." *Krystal* relied on a specific statutory waiver, 11 U.S.C. § 106(a). *Reich v. Mashantucket Sand & Gravel,* 95 F.3d 174, 178 (2d Cir. 1996) follows *Donovan* and rejects the automatic exclusion reasoning that the "proposed test would invariably compel the conclusion that every federal statute that failed expressly to mention Indians would not apply to them. We believe that so sweeping a conclusion is inconsistent with the limited sovereignty retained by Indian tribes". *Reich, id* at 178, concludes that an Indian tribe is dependant and subordinate to the federal government. If a federal statute applies, the affected tribe has no sovereignty. *Smart v. State Farm Ins. Co.,* 868 F.2d 929, 932 (7th Cir. 1989) and *Solis v. Matheson,* 563 F.3d 425, 429 (9th Cir. 2009). *Florida Paraplegic v. Miccosukee Tribe of Indians of*

Florida, 166 F.3d 1126, 1129 (11th Cir. 1999) rejects the *Donovan* exceptions and holds that tribally owned businesses must comply with federal statutes of general applicability even if they may not be liable in damages by private party suits. The Court stated, *id* at 1135, "As Indian tribes and their members become more integrated into the mainstream cultural and economic activities of American society, maintaining this balance becomes increasingly difficult". *San Manuel Indian Bingo and Casino v. N.L.R.B.,* 475 F.3d 1306, 1315 (D.C. Cir. 2007) followed *Donovan* and applied the national labor relations act to a tribe noting that no *Donovan* exception applied and that the casino operation was a commercial enterprise. *Miccosukee Tribe of Indians of Florida v. U.S.,* 698 F.3d 1326, 1331 (11th Cir. 2012) states "Tribal sovereign immunity would not bar a suit by the United States." The Ninth Circuit automatic exclusion applying the *Donovan* exception is completely and in total error. The anti-trust laws do not refer to any "legislative history or some other means that Congress intended the law not to apply to Indians on their reservations". *Miller,* 705 F.3d at 927. The opinion then states "As we have explained, federal anti-trust laws are not intended to apply to Indian tribes". The opinion never explained why *Donovan* did not apply. The opinion states "Nowhere does either statute employ the sort of language we and other circuits have held to unequivocally abrogate tribal sovereign immunity". The Trial Court Opinion in this case, 830 F.Supp.2d 1078, 1082 (E.D.Wn 2011), App. 4, noted a distinction between sovereign immunity and immunity from suit. The Court failed to note that the incidence of tax is on Daniel Miller, a non Indian non resident, Complaint App. 37. The Indian tribe had no consensual

relationship over Miller. Article III jurisdiction existed by Miller as plaintiff. The court below ignored this issue. The holding is also in direct contradiction to *United States v. Baker,* 63 F.3d 1478, 1486 (9th Cir. 1995). In *Baker,* the Circuit held that even a congressional hearing reference was not intended to remove Indian immunity from state cigarette tax, therefore, it did not come within the *Donovan* exceptions. 18 U.S.C. § 2342. The statutory language must be specific, *Baker, supra* at 1485. The Ninth Circuit cannot ignore its own well established precedent followed by other circuits. If *Donovan v. Coeur d'Alene Tribal Farm,* 751 F.2d at 1117-8 (9th Cir. 1985), applies, the Colville Tribe has no sovereignty from suit and this case is reversed. It applies as the Colville Tribe is selling cigarettes at retail of like kind and quality, a clearly commercial activity. There is no proof of any intent of Congress to except Indian tribes.

D. The tribal officials were sued individually. They have no immunity of any kind when they act in violation of federal law.

Felix S. Cohen's Handbook of Federal Indian Law, § 7.05[1](a) at 638 (Nell Jessup Newton ed., 2012) states:

> The immunity protects tribal officials acting within the scope of their authority, as well as tribal employees, *Santa Clara Pueblo v. Martinez,* however, holds that the doctrine of *Ex parte Young* extends to the tribal context, allowing suits against tribal officials in their official capacities for declaratory or injunctive relief.

A tribal officer can be enjoined from an ongoing violation of federal law. This issue is reviewed at pages 11 and 12 hereafter. The Ninth Circuit ignored the allegations of the Complaint, naming tribal officials and alleging individual liability. The Complaint App. 38, states that "Defendant Tom Sargent is the Cigarette Administrator for the Colville Confederated Tribe" Complaint App. 38, 44-5. The Complaint requests injunctive relief. App. 62, 64, 34.

Injunctions were also requested by other references in the Complaint. App. 38, 44-5. Irreparable damage is alleged. App. 51 - 2 as is continuing unlawful conduct of Defendants. App. 40.

E. Immunity of tribal officials does not apply to injunctive relief for violation of federal law. Tribal officials can be enjoined against future anti-trust conduct.

Baker Elec. Co-op v. Chaske, 28 F.3d 1466, 1471-2 (8th Cir. 1994) upholds enjoining tribal officers. *Vann v. Kempthorne,* 534 F.3d 741 (D.C. Cir. 2008) provides the partial answer. The Court noted, *id* at 747, that immunity is an attribute of sovereignty, but there is a difference between compliance with laws and enforceability. The decision was sent back to determine whether the suit could proceed against the officers, but not the Tribe. The opinion, *id* at 750-1, states that tribal officials taking acts beyond their authority or acting unconstitutionally is not conduct of the sovereign. *Vann v. United States Department of Interior,* 701 F.3d 927 (D.C. Cir. 2012) goes all the way and upholds a suit for injunction against a tribal

official without joining the tribe. This case created a conflict of circuits with this case.

Petitioner's Complaint App. 36 - 7, alleges a conspiracy to violate civil and constitutional rights.

F. The ongoing violation of federal law of general applicability also waives tribal immunity.

Crowe and Dunlevy v. Stidham, 640 F.3d 1140 (10th Cir. 2011) joins the Eighth, Tenth and Eleventh Circuits in upholding the principle that an ongoing violation to federal law waives tribal immunity. Petitioners' Complaint App. 33, 36 -7, 42 - 3, 59 - 60 and throughout alleges an ongoing violation of federal anti-trust law. The Ninth Circuit and the District Court did not follow the four sister circuits. This conflict should also be resolved by this Court.

REASONS FOR GRANTING THE PETITION

A. Sovereign Immunity must be abrogated where price fixing and other unfair competition is willfully applied by a tribe, a market competitor.

The states have sovereign immunity against suit. Each state is a sovereign entity in our federal system. It cannot be sued without its consent. This immunity is conferred by the Eleventh Amendment to the U.S. Constitution. *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 54 (1996).

The United States government cannot be sued without its consent. U.S. Constitution, Art III § 2. *Minnesota v. Hitchcock,* 185 U.S. 373, 386 (1902). States, foreign nations and the federal government have by various federal laws and statutes selectively waived and been denied sovereign immunity, especially where claims result from commercial activities. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies Inc.,* 523 U.S. 751, 765 (1998). The tribal sovereign immunity asserted in this case is immunity from suit by the tribe. No constitutional provision or Indian treaty addresses tribal sovereign immunity. This country allows many organizations to reside on communal lands in segregation, i.e. Amish, Hutterites and others. However, their organizations have no sovereign immunity. Holding the Colville Tribe immune from federal price fixing and other unfair competition, federal laws allow a competitor to control the market. 15 U.S.C. § 1, 13, 15 and 26 prevent these unfair practices. *Hays v. United Fireworks Mfg.,* 420 F.2d 836 (9th Cir. 1969). Indian tribes are now super sovereigns greater than the states or foreign countries. Recently, this Court in *Madison County, New York v. Oneida Indian Nation of New York,* 131 S.Ct. 459 (2010) granted certiorari to review a decision upholding Indian tribe immunity against state foreclosure of land for failure to pay taxes owed on the land. When the Oneida tribe waived its immunity, this Court vacated the grant of certiorari and remanded the case to the Second Circuit, 131 S.Ct. 704 (2011). This Court upheld tribal sovereign immunity in *Kiowa Tribe of Oklahoma,* 523 U.S. 751 (1998) forbidding collection of a commercial note executed by the tribe. The Court, *id* at 758, suggested "a need to abrogate tribal immunity". The intervening 14 years have magnified the illogic and

unjust results. The need to abrogate sovereign immunity in this case reaches far beyond collecting a promissory note or taxing parcels of land. Indian tribes had $27.4 billion in gaming revenue in 2011. *"More Chips on the Table"*, Indian Country Today, Vol 3, issue 11, March 27, 2013, pages 24-25 (quoting the 2013 Casino City Indian Gaming Industry Report). A good example of then and now is the statement in *Keweenaw Bay Indian Community v. Naftaly,* 452 F.3d 514, 527 (6th Cir. 2006) that in 1854, at the time their treaty was signed, ". . . the Chippewa Indians did not have much hard currency." Judge Cabranes wanted law and logic to be reunited by abrogating tribal immunity. *Oneida Indian Nation v. Madison County,* 605 F.3d 149, concurring opinion at 104 (2d Cir. 2010) (rev'd 665 F. 3d 408 (2nd Cir. 2011)). Lack of anti-trust compliance by tribes will result in national control of retail pricing.

This Court apparently recognized tribal immunity 94 years ago in *Turner v. United States,* 248 U.S. 354, 358 (1919). However, the immunity issue was dicta. Similar logic as used in *United States v. Lara,* 541 U.S. 193, 206 (2004) should be applied here. ". . .sources as they existed at the time" must be considered. If historic practices were different when the decision was rendered, current decisions can change the law. In 1919 tribal business competition, if any, was minimal. Tribal immunity is now out of regulatory control and is a monster in the business community, growing more powerful every day. A bizarre example is illustrated by *State v. Youde,* 2013 WL 2157687 (Wash.App. Div. I May 20, 2013). The Tualip Indian Tribe, through an undercover tribal police officer, lured a non Indian medical marijuana seller, who was acting legally in the state, onto the reservation and bought marijuana from

her. She was charged with a state crime in Snohomish County, Washington. The Tribe refused her constitutional right to entrapment discovery on the basis of sovereign immunity. The state court upheld sovereign immunity and denied discovery. Like Petitioner Miller, Ms. Youde is harmed by the doctrine. *Turner*, without extensive reasoning, is credited with tribal sovereign immunity. The language of *Grider v. Cavazos,* 911 F.2d 1158, 1164 (5th Cir. 1990) applies. "This case illustrates the danger posed by a line of jurisprudence which, like Topsy, 'just grew' as the result of stacking one inapposite citation upon another until, in the aggregate, they take on the appearance of valid precedent". This Court controls common federal law legal precedent. Indian tribes, different from the federal government and states, now may indiscriminately compete in the retail marketplace. Recent examples are *Center for Biological Diversity v. Pizarchik,* 858 F.Supp.2d 1221, 1227 (D.C. Colo 2012) holding that sovereign immunity barred a suit under the endangered species act disputing a renewal of a coal mining lease. The lease had previously yielded 39 million dollars in royalties to the affected tribe. In *Michigan v. Bay Mills Indian Community,* 695 F.3d 406 (6th Cir. 2012), a suit by the State of Michigan questioning whether the tribe was on Indian land, seeking to stop a small casino started by an Indian tribe, was barred by sovereign immunity. In *Shivwits Band of Paiute Indians v. Utah,* 428 F.3d 966 (10th Cir. 2005), a non Indian billboard company approached the Indian tribe and loaned the tribe the money to buy land adjoining an interstate highway. The tribe bought the land, leased it to the billboard company on a long term lease and put the land in trust. The Court held that the state could not enforce its highway beautification

act against the tribe as it was immune by tribal sovereignty, *id* at 982. If economic stability and parity is to be achieved, this Court must subject the Colville Tribe to marketplace laws. Like *Lakoduk v. Cruger,* 287 P.2d 338, 340 (Wash. 1955), the test is governmental versus proprietary "Whether the act performed is for the common good of all, that is for the public, or whether it is for the special benefit or profit of the corporate entity". (Quoting *Hagerman v. City of Seattle,* 66 P.2d 1152, 1155 (Wash. 1937). If not checked, the Indian tribes will unfairly rule the martketplace. Neither the colonial tribes nor English settlers could envision this result. The Ninth Circuit decisions create a radical act of largesse and another windfall to Indian tribes. Indian tribes are having a major role in state and federal economies. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.,* 523 U.S. 751 (1998) established the current standard "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity".

Jeff M. Kosseff, note: "*Sovereignty for Profits; Court's Expansion or Sovereign Immunity to Tribe Owned Businesses*" 5 Fla. A & M U.L. Rev. 131, 138 (2009) reviews 71 court opinions, post *Kiowa,* applying tribal sovereign immunity to commercial businesses that are tribally owned. The large number of cases indicates widespread competition creating unfair business practices.

Petitioners urge this Court to eliminate tribal sovereignty and tribal immunity from suit. When an Indian tribe competes in the marketplace at the retail level, its immunity to suit should be waived. It must

comply with applicable federal laws of general applicability in the same manner as its competition. The pendulum of tribal sovereignty must swing back, at least where retail sales competition is the issue.

Judge Gould in *Cook v. AVI Casino Enterprises,* 548 F.3d 718, 727 (9th Cir. 2008) suggests that a new rule of immunity, at least where the gaming industry is involved, should be supplied by this Court. In AVI, an Indian casino was held immune from a damage action by a non-Indian casino employee hit by a vehicle driven by a drunk driver who became intoxicated. Even more tragic is *Furry v. Miccosukee Tribe of Indians of Florida,* 685 F.3d 1224 (11th Cir. 2012). The Indian tribe bar patron who died was an alcoholic and known to casino employees to be an alcoholic. On multiple occasions the tribe served her "a substantial amount of alcohol" *id* at 1227. "Employees of the defendants witnessed Ms. Furry get in her car and leave the premises in an obviously intoxicated condition", *id* at 1227. A short time later, she was killed as a result of a head-on collision with another vehicle. "After the accident Ms. Furry's blood alcohol level was measured at .32 four times Florida's legal limit of .08" *id* at 1227. Her father's lawsuit for dram shop liability was dismissed on the grounds of tribal sovereignty.

These cases and others make a mockery of the nationwide effort to prevent driving, drinking and other limits on business and human misconduct. The constitutional system of checks and balances between branches seems unable or unwilling to prevent these tragic results even in life or death situations. Limits must be allowed by an abrogation of tribal sovereignty in commercial situations.

B. If the Court declines to hear the immunity issue, the conflict between the D.C. Circuit in *Vann v. United States Department of Interior*, 701 F.3d 927 (D.C. Cir. 2012) and this case should be resolved.

In this case, separate and distinct claims *were* alleged against tribal officials including Tom Sarget, the tribe's tobacco tax administrator. A conflict in circuits has developed in the case of *Vann v. U.S. Dept of Interior,* 701 F.3d 927 (D.C. Cir. 2012). *Vann* holds that a suit against the chief of an Indian tribe in his official capacity for declaratory and injunctive relief could proceed without the tribe as a party. The reasoning of the court in *Vann* is unequivocal stating on 929:

> The *Ex parte Young* doctrine allows suits for declaratory and injunctive relief against government officials in their official capacities-notwithstanding the sovereign immunity possessed by the government itself. . .Nor is there any basis for distinguishing this case involving an American Indian tribe from a run-of-the-mill *Ex parte Young* action.

In the final version of *Miller v. Wright,* 705 F.3d at 928, the Court stated, "The Tribe's sovereign immunity thus extends to its officials who were acting in their official capacities and within the scope of their authority when they taxed transactions occurring on the reservation".

Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505,

514 (1991), while upholding tribal sovereignty against collectors of the state cigarette taxes from a tribally owned cigarette store, notes that *Ex Parte Young,* 209 U.S. 123 (1908) may allow suits against tribal officers or agents.

The Ninth Circuit Opinion of *Miller v. Wright* also failed to apply the Supreme Court case of *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 59 (1978) and its own opinions in *Dawavendewa v. Salt River Project,* 276 F.3d 1150, 1159-61 (9th Cir. 2002); *Burlington Northern Railway v. Vaughn,* 509 F.3d 1085, 1092 (9th Cir. 2007); *Arizona Public Service v. Aspaas,* 77 F.3d 1128, 1134 (9th Cir. 1995) and *Big Horn Electrical Co-op v. Adams,* 219 F.3d 944, 953 (9th Cir. 2000). *Maxwell v. County of San Diego,* 697 F.3d 941, 954 (9th Cir. 2012) goes a step further and holds that the tribal employees are not immune from damage awards where gross negligence is alleged. All uphold injunctions and declaratory judgment claims against tribal officials acting in violation of law.

> . . .A decision of the Supreme Court will control that corner of the law unless and until the Supreme Court itself overrules or modifies it. Judges of the inferior courts may voice their criticisms, but follow it they must. . . Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court. *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2000)

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

DATED this 30th day of May, 2013.

Respectfully Submitted,

ROBERT E. KOVACEVICH
Counsel of Record
818 West Riverside, Ste 525
Spokane, WA 99201-0995
Phone: (509) 747-2104
kovacevichrobert@qwestoffice.net

Counsel for Petitioners